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NO. 99-1185

# IN THE SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF PETITIONER

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## QUESTION PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that the Kansas law authorizing commitment of sexually violent predators is civil in nature and does not violate the double jeopardy or *ex post facto* clauses. The Kansas law was modeled on Washington's Sexually Violent Predator Statute and the two laws are substantially similar. This case presents the following question regarding Washington's Sexually Violent Predator Statute:

Whether an otherwise valid civil statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during the individual's commitment.

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## OPINIONS BELOW

The Ninth Circuit's Order Amending Opinion And Denying Rehearing And Amended Opinion is reported at 192 F.3d 870 (9th Cir. 1999), and is included in the Appendix To The Petition For A Writ Of Certiorari (Pet. App.) at 1a-13a. The order of the district court is unpublished. Pet. App. at 15a-27a. The opinion of the Washington Supreme Court is reported at 122 Wash. 2d 1, 857 P.2d 989 (1993). Pet. App. at 28a-102a.

## JURISDICTION

This Court's jurisdiction to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The judgment of the Ninth Circuit was entered May 20, 1999. On September 16, 1999, in response to a timely motion for rehearing en banc, the Court of Appeals issued an Order Amending Opinion And Denying Rehearing And Amended Opinion. On November 30, 1999, Justice O'Connor granted an extension of time in which to file a Petition For A Writ Of Certiorari to and including January 14, 2000. The Petition For A Writ Of Certiorari was filed January 14, 2000, and this Court granted the petition January 24, 2000.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The *Ex Post Facto* Clause of Article I, Section 10, provides that "[n]o State shall . . . pass any . . . ex post facto Law . . . ."

The provisions of Washington's Sexually Violent Predators Statute (Statute), Wash. Rev. Code 71.09, as it existed when respondent was committed, are set forth in the Petitioner's Appendix at pages 103a-111a. The Statute was subsequently amended, and the current version of the law is set forth in the Petitioner's Appendix at pages 112a-135a.

## STATEMENT

This case raises a fundamental question involving this Court's civil versus criminal jurisprudence under the double jeopardy and *ex post facto* clauses: whether Washington's facially valid civil commitment law may be divested of its civil nature and be held to violate the double jeopardy and *ex post facto* clauses, if the commitment facility fails to provide adequate treatment or other conditions of confinement required by the law.

Both the Washington Supreme Court and the Ninth Circuit held that the statute, on its face, is a civil commitment law that is not punitive in purpose or effect. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993), Pet. App. at 28a-102a; *Young v. Weston*, 192 F.3d 870, 874 (9th Cir. 1999), Pet. App. at 1a-13a, 7a ("*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses"). There is no dispute, in this Court, that respondent Young is dangerous and suffers from a mental abnormality that makes him likely to engage in predatory acts of sexual violence and that Young's commitment was proper and met constitutional requirements. There also is no dispute that Washington's law requires adequate care and individualized treatment. It is Young's claim that such care and treatment are not being provided.

### A. Washington's Sexually Violent Predators Statute

The Washington Statute providing for the civil commitment of sexually violent predators served as the model for the Kansas Act that was upheld by the Court in *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997) (Breyer, J., dissenting). The Washington and Kansas statutes are identical in all relevant respects except that, unlike the Kansas Act upheld in *Hendricks*, Washington's Statute authorizes the treatment of persons



committed under its terms in settings less restrictive than total confinement. Wash. Rev. Code § 71.09.090[1], Pet. App. at 124a.

As with the Kansas Act, the Washington Statute defines a "sexually violent predator" as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Wash. Rev. Code § 71.09.020(1), Pet. App. at 114a. A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others". Wash. Rev. Code § 71.09.020(2), Pet. App. at 114a.

Under the Statute, the county prosecutor (or Attorney General acting on the prosecutor's behalf) may file a petition in superior court alleging that a person is a sexually violent predator. Wash. Rev. Code § 71.09.030, Pet. App. at 117a. Within 72 hours of the petition's filing, a hearing is held to determine whether there is probable cause to detain the person pending trial. Wash. Rev. Code § 71.09.040(2), Pet. App. at 118a. The Statute provides for a right to trial within 45 days of the probable cause determination. Wash. Rev. Code § 71.09.050(1), Pet. App. at 119a.

Throughout the trial proceedings, the detained person is entitled to counsel and to have qualified "experts or professional persons" perform an evaluation on his or her behalf. Wash. Rev. Code § 71.09.050(2), Pet. App. at 119a. The Statute allows for trial by jury and requires a unanimous verdict in order for the detained person to be adjudged a sexually violent predator. Wash. Rev. Code §§ 71.09.050(3), .060(1), Pet. App. at 120a. At trial, the State must prove beyond a reasonable doubt that the

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[1] We cite to the current version of the Statute, except as otherwise indicated.

person is a sexually violent predator. Wash. Rev. Code § 71.09.060(1), Pet. App. at 120a.

If the jury finds the person to be a sexually violent predator, he or she is committed to the custody of the Department of Social and Health Services (DSHS) "for control, care, and treatment" in a secure facility until the person's mental abnormality has so changed that he or she is safe to be at large, or to be conditionally released to treatment in an environment less restrictive than total confinement. Wash. Rev. Code § 71.09.060(1), Pet. App. at 120a.

Each person committed under the Statute is entitled annually to a current evaluation of his or her mental condition, danger to re-offend in a sexually violent manner, and amenability to treatment in a less restrictive setting than total confinement. Wash. Rev. Code § 71.09.070, Pet. App. at 122a. The statute requires that a report of this evaluation be provided to the committed individual and to the committing court. Wash. Rev. Code § 71.09.070, Pet. App. at 122a. At a minimum, Washington's Statute entitles a person committed as a sexually violent predator to an annual judicial review of the commitment. Wash. Rev. Code § 71.09.090(2), Pet. App. at 125a. In addition, the committed person may petition the court for an unconditional discharge or treatment in a less restrictive setting. Wash. Rev. Code § 71.09.090, Pet. App. at 124a.

Although a person adjudged a sexually violent predator is involuntarily committed, the Statute preserves the committed person's civil rights:

> "Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." Wash. Rev. Code § 71.09.080(1), Pet. App. at 122a.

Consistent with its purpose of committing sexually violent predators for "control, care, and treatment", the Statute



specifically requires that "[*a*]*ny person committed pursuant to this chapter has the right to adequate care and individualized treatment*." Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a (emphasis added).[2]

The Statute does not specify a particular facility in which statutorily mandated control, care, and treatment is to be provided. It prohibits incarceration in a state correctional facility, but as was the case in Kansas, confinement in a mental health facility that is located within a correctional institution is authorized.[3] Wash. Rev. Code § 71.09.060(3), Pet. App. at 121a; Wash. Rev. Code § 10.77.220, Joint Appendix (JA) at 155; *Hendricks*, 521 U.S. at 379 (Breyer, J., dissenting). DSHS operates a secure facility for this purpose called the "Special Commitment Center" (SCC).[4] The SCC is located on the grounds of a medium security prison, but it is segregated from the prison and is operated by DSHS, not by Washington's criminal corrections agency.

**B. Proceedings Relating To Young**

**1. State Court Proceedings**

The State of Washington initiated sexually violent predator commitment proceedings against Young in 1990,

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[2] The requirement for adequate care and individualized treatment in the current version of the Statute carries over from the original law that required that "[t]he involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment." Wash. Rev. Code § 71.09.080 (1990), Pet. App. at 109a.

[3] Until 1998, the SCC was located within a Department of Corrections facility in Monroe, Washington. It is now located on McNeil Island, within the boundaries of the McNeil Island Corrections Center.

[4] Not all sexually violent predators are detained and treated at the SCC. Several individuals, having been deemed safe to reside in community treatment, reside in half-way house-type placements or in private residences. In addition to receiving on-going treatment, these individuals are subject to monitoring requirements. *See, e.g., In re Peterson,* Snohomish Cy. Cause No. 92-2-05722-9; *In re Aqui,* King Cy. Cause No. 92-2-23217-1.

under the State's then newly enacted Statute. JA at 19. The evidence presented in the commitment proceedings focused on Young's extensive history of sexual violence and the mental condition that made similar acts likely in the future.

Young's history included convictions for six violent rapes of adult female strangers over the course of thirty-one years, during the intermittent periods when Young was free from incarceration. *In re Young*, 122 Wash. 2d at 13-14, Pet. App. at 32a-33a; JA at 20-23. The State's expert witness, Dr. Dreiblatt, testified that Young suffered from a mental abnormality – a severe paraphilia that would be classified as either paraphilia sexual sadism or paraphilia not otherwise specified (rape), and a severe personality disorder, with primarily paranoid and anti-social features. *Id.* at 15, 34a, 23. Dr. Dreiblatt further testified that Young's severe paraphilia, his personality disorder, the length of time spanning his crimes, the number of his offenses, his use of weapons in committing rape, his persistent denial of the rapes, and his lack of remorse or empathy for his victims made him likely to commit further sexually violent acts. *Id.* at 15-16, 34a-35a, 23.

After weighing the evidence, a unanimous jury determined beyond a reasonable doubt that Young was a sexually violent predator. *In re Young*, 122 Wash. 2d at 16, Pet. App. at 35a. An order committing Young to the "control, care, and treatment" of DSHS was entered by the trial court. JA at 30. DSHS placed Young in the SCC.

Young appealed his commitment directly to the Washington Supreme Court, challenging the constitutionality of the Statute on a variety of grounds, including double jeopardy and *ex post facto*. *In re Young*, 122 Wash. 2d at 10-11, Pet. App. at 29a. Young also alleged errors specific to his commitment proceedings. *Id.* In August 1993, the court upheld the constitutionality of Washington's Sexually Violent Predators Statute in *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). The court rejected Young's double jeopardy and *ex post facto* challenges, applying the two-tiered analysis reflected



in *Allen v. Illinois*, 478 U.S. 364 (1986), and *United States v. Ward*, 448 U.S. 242 (1980), and subsequently reaffirmed in *Hendricks*.

First, the Washington Supreme Court reviewed the Statute and its legislative history and concluded that "[b]oth the language of the Statute and the legislative history evidence a clear intent to create a civil scheme." *In re Young*, 122 Wash. 2d at 19, Pet. App. at 38a. The court then applied the factors established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to consider whether the "purpose and effect" of the Statute also evidenced a civil legislative scheme. The court concluded that the *Kennedy* factors weighed "heavily on the side of a finding that this Statute is civil", and held that the Statute "is primarily concerned with incapacitation and treatment". *In re Young*, 122 Wash. 2d at 21-22, Pet. App. at 41a-42a.

The Washington Supreme Court next considered and rejected Young's challenges specific to his commitment proceedings. The court then remanded the case for consideration of whether a less restrictive alternative to total confinement would be appropriate in Young's case.[5] *Id.* at 60, 87a. Young did not seek review by this Court of the Washington Supreme Court's decision. Young did file a petition for a writ of habeas corpus.

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[5] The initial version of Washington's Statute did not provide for consideration of commitment less restrictive than total confinement. The Washington Supreme Court held in *In re Young* that equal protection required such consideration. *In re Young*, 122 Wash. 2d at 47, Pet. App. at 72a-73a. The Washington Legislature subsequently amended the Statute to specifically provide for consideration of less restrictive alternatives. 1995 Wash. Laws, ch. 216.

On remand, a jury unanimously determined that Young should remain confined in a secure facility. Young has appealed this verdict, and his appeal is pending in the Washington Court of Appeals. *In re Young*, Wash. Ct. of Appeals Div. I Cause No. 34931-7-I.

### 2. The *Turay* Proceeding

Before turning to Young's habeas corpus petition, a separate piece of litigation upon which Young relied in his "as applied" challenge (and referenced in opposition to certiorari in this case) should be noted. In 1991, shortly after enactment of the Statute, another resident of the SCC, Richard Turay, brought suit under 42 U.S.C. § 1983, alleging unconstitutional conditions of confinement and inadequate treatment at the SCC. *Turay v. Seling*, No. C91-664WD (W.D. Wash.), JA at 64-65. In 1994, following a trial on the merits, a federal jury rejected all but one of Turay's claims – i.e., that the SCC defendants had failed to provide constitutionally adequate mental health treatment. JA at 64-65. In June 1994, based on the jury's verdict, the federal district court entered an injunction requiring the SCC to bring its treatment program into compliance with constitutional standards. Noting that the Constitution requires the State to provide a person civilly committed "with access to mental health treatment which gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined" (JA at 65), the injunction directed the SCC defendants to (1) to provide for initial and ongoing training and hiring of competent therapists; (2) to implement strategies to improve trust and rapport between residents and treatment providers; (3) to implement a therapy program that includes all professionally recognized therapy components; (4) to develop and maintain individualized treatment plans that include objective benchmarks of improvement; and (5) to provide a psychologist or psychiatrist expert in diagnosis and treatment of sex offenders to supervise and consult with the treatment staff. JA at 67.

The *Turay* injunction remains in effect, and the district court has been diligent in enforcing its terms. The court appointed a special master to assist the SCC defendants in achieving compliance and to report to the court on compliance. JA at 11. The court also has conducted periodic evidentiary hearings concerning compliance.



In November 1999, dissatisfied with the pace of improvement efforts, the district court held the SCC defendants in contempt for failing to take all reasonable steps to comply with the injunction and ordered coercive monetary sanctions to commence as of May 1, 2000, unless compliance or substantial compliance was sooner achieved. Br. Opp'n App. B. In its subsequent and most recent review hearing in April 2000, the district court found that the defendants "have made a genuine and sustained effort to bring the SCC program into compliance with the injunction" and that compliance is approaching the point of being substantially complete. The court held in abeyance the imposition of the monetary sanctions pending the outcome of a further hearing on compliance in December 2000. Lodged Order at 9-10.[6]

### 3. Young's Federal Court Proceedings

Following the decision of the Washington Supreme Court, Young filed a Petition For Writ Of Habeas Corpus in federal district court for the Western District of Washington under 28 U.S.C. § 2254. On August 25, 1995, the federal district court held the Statute unconstitutional on double jeopardy, *ex post facto*, and substantive due process grounds, but stayed Young's release. Pet. App. at 15a. The State appealed to the Ninth Circuit. While the State's appeal was pending, this Court issued its decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Ninth Circuit then entered an order remanding this case to the district court for reconsideration in light of *Hendricks*.

On remand, the district court dismissed Young's petition, upholding the Statute under *Hendricks* and rejecting all of Young's claims. Pet. App. at 16a. The district court rejected Young's newly formulated "as applied" double

[6] The district court's most recent order and the most recent report of the special master have been lodged with this Court. Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000, *Turay v. Seling*, No. C91-664WD (W.D. Wash.); Seventeenth Report Of The Special Master, *Turay v. Seling*, No. C91-664WD (W.D. Wash.).

jeopardy and *ex post facto* challenges, noting that in *Hendricks* the Court had focused on the face of the statute and had found Kansas' statute non-punitive. Pet. App. at 16a-17a. Young appealed to the Ninth Circuit. Pet. App. at 4a.

On appeal, the Ninth Circuit determined that, because the Kansas Act "was modeled on and is substantially similar to the Washington statute, *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a. The court also rejected each of Young's allegations of error with respect to his commitment proceedings. *Id.* at 876, 12a-13a. Nonetheless, the Ninth Circuit reasoned that "*Hendricks* does not preclude the possibility that the Washington statute, *as applied*, is punitive", and concluded that "[a]ctual conditions of confinement may divest a facially valid statute of its 'civil' label[.]" *Id.* at 874, 7a-8a (italics theirs).

The court rejected the State's argument that, pursuant to *Hudson v. United States*, 522 U.S. 93, 100, 101 (1997), characterization of a statute as civil or criminal is determined in relation to the statute on its face, and not with regard to the sanction imposed in a particular case. In a footnote, the Ninth Circuit purported to distinguish *Hudson* on the basis that it involved "monetary penalties and occupational disbarment", whereas "this case involves confinement". *Young v. Weston*, 192 F.3d at 874 n.4, Pet. App. at 7a n.4. The Ninth Circuit asserted that "the Supreme Court has always looked to the actual conditions of confinement" in cases considering the question of whether confinement is criminal or civil. *Id.*

The Ninth Circuit determined that Young had alleged facts, which, if proved, would establish the punitive nature of his confinement and would entitle him to relief.[7] *Id.* at 874-75,

[7] Although the court did not specify precisely the nature of the relief to which Young might be entitled, Young has consistently maintained that he is entitled to release. JA at 76.



8a. The court remanded the case for an evidentiary hearing on Young's double jeopardy and *ex post facto* claims. *Id.* at 877, 13a. The State filed a timely petition for rehearing en banc, which was denied.

This Court granted the State's Petition For A Writ Of Certiorari March 20, 2000. JA at 152. Young did not file a cross petition.

## SUMMARY OF ARGUMENT

**1.** The double jeopardy and *ex post facto* clauses apply exclusively to criminal proceedings and punishments. To determine whether these criminal protections apply to a particular law, this Court has developed a two-part test to judge whether the law is civil or criminal. In *Hudson v. United States*, 522 U.S. 93 (1997), the Court rejected an "as applied" approach to determining the civil or criminal character of a law and confirmed that the civil or criminal nature of a law is determined on its face. Applying the same two-part test in *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court ruled that the Kansas sexually violent predator act, on its face, is a civil law not subject to the double jeopardy and *ex post facto* clauses. Washington's Sexually Violent Predators Statute is virtually identical to the Kansas Act.

**2.** Despite the facial validity of Washington's Statute, the Ninth Circuit held that the Statute could be divested of its civil nature and converted into a criminal statute if Young demonstrates that his conditions of confinement are punitive. Contrary to *Hendricks* and *Hudson*, the Ninth Circuit ruled that, with regard to laws involving confinement, the civil versus criminal character of the law is determined by an "as applied" test and not on the face of the law. In support of this claim, the Ninth Circuit cited, without analysis, *Hendricks*, *Allen v. Illinois*, 478 U.S. 364 (1986), and *Bell v. Wolfish*, 441 U.S. 520 (1979). These decisions do not support the Ninth Circuit. In each, the civil or criminal nature of the statute in question was determined on the face of the law.

**3.** The facial approach to the civil versus criminal test reaffirmed in *Hudson*, is consistent with the purpose of the test, the purpose of the double jeopardy clause, and the language of the *ex post facto* clause. The purpose of the civil versus criminal inquiry is to prevent legislative bodies from placing a "civil" label on a criminal law to avoid the protections that the Constitution requires in criminal proceedings. Since the purpose of the test is to limit legislative abuse of power, the focus of the test should be on the legislative branch and the law in question – on its face. Indeed, this Court has repeatedly held that the question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.

The historic purpose of the double jeopardy clause is to protect persons from a second trial for the same offense. This purpose is given effect by a facial inquiry, not an "as applied" test. Under an "as applied" test, the double jeopardy determination would only be made after a person has been committed and is subject to confinement. At that point, the person already has suffered the very harm that the double jeopardy clause was designed to prevent.

The Court's facial test comports with the language of the *ex post facto* clause which speaks to the passage of a *law*. The Court's decisions interpreting the clause focus on this law-making function. By contrast, the Ninth Circuit's "as applied" test would depart from the law and look at the day-to-day conduct of the SCC which, if Young's allegations are correct, is contrary to the express requirements of the Statute. Thus, the Ninth Circuit's "as applied" analysis would not turn on retroactive application of the law, but on alleged administrative actions which, if true, violate the Statute.

**4.** The Ninth Circuit's "as applied" test also is inconsistent with separation of powers and is an unworkable approach. Under the Ninth Circuit's "as applied" test, an executive agency effectively may render punitive and thus, invalid, Washington's civil law, simply by failing to provide



the care and treatment that it specifically requires. The Ninth Circuit's approach must be rejected because the executive branch has no constitutional power to suspend laws adopted by the legislative branch. Indeed, the Constitution requires the executive to faithfully execute the law.

Further, the "as applied" test is unworkable in the context of confinement because it extends over a period of time under conditions that may change. If conditions of confinement are inadequate at some point, but later become adequate, it is unclear to which conditions an "as applied" test is to look. Such a test also fails to finally determine the civil or criminal nature of the Statute under the double jeopardy and *ex post facto* clauses. Under the Ninth Circuit's "as applied" approach, the constitutionality of the Washington Statute may vary from day to day and from person to person, depending on conditions of confinement.

**5.** Finally, the Ninth Circuit's conclusion that Washington's Statute may violate the double jeopardy and *ex post facto* clauses is in conflict with *Hendricks* for reasons in addition to its rejection of this Court's facial test. In *Hendricks*, the Court held that these two clauses do not even apply to the Kansas Act. The Court concluded that the double jeopardy clause does not apply because the Kansas Act did not make the commission of a specified offense the basis for invoking the commitment proceeding. The prior conviction was used only for evidentiary purposes to determine whether a person suffers from a mental abnormality or personality disorder and poses a threat to the public. The Court also concluded that the *ex post facto* clause did not apply because the Kansas Act did not have retroactive effect. Rather, commitment was predicated on demonstrating that a person currently suffers from a mental abnormality and is likely to be dangerous. These two holdings apply equally to Washington's Statute, which in all material respects is identical to the Kansas Act.

6. Although Young's claim of inadequate care and treatment does not implicate the civil character of Washington's Statute for double jeopardy or *ex post facto* purposes, Young nevertheless has a remedy available for his claim. There is no question that Young has a right to adequate care and treatment both under the Statute and the Constitution. However, Young's remedy is an action under 42 U.S.C. § 1983, challenging allegedly inadequate conditions, not a habeas proceeding challenging the validity of the Statute.

## ARGUMENT

The sole matter before this Court is the Ninth Circuit's holding that Washington's civil commitment statute may be divested of its civil nature and converted to a criminal statute that violates double jeopardy and *ex post facto* prohibitions if Young demonstrates that his conditions of confinement are punitive. Thus, according to the Ninth Circuit, if DSHS, the agency charged with administering the Statute, fails to comply with its terms and instead engages in punitive conduct, the agency's unauthorized actions vitiate the civil nature of the Statute and render it invalid "as applied".

Under the Ninth Circuit's approach, it no longer would matter that the Legislature intended to adopt a civil statute and effectuated its intent by enacting a statutory scheme that is civil in its purpose and effect. Rather, administration of the Statute in a manner contrary to its requirements would result in invalidating the law "as applied" for purposes of the double jeopardy and *ex post facto* clauses. The Ninth Circuit's so called "as applied" test dramatically departs from this Court's double jeopardy and *ex post facto* jurisprudence. It conflicts directly with *Hudson* and *Hendricks* and finds no support in decisions of this Court applying the double jeopardy and *ex post facto* clauses. The appropriate remedy for the deficiencies alleged by Young is to be found in 42 U.S.C. § 1983. The Ninth Circuit's decision should be reversed.



### A. The Sexually Violent Predators Statute, On Its Face, Satisfies The Double Jeopardy And *Ex Post Facto* Clauses

#### 1. The Court Has Adopted A Two-Part Facial Test To Determine Whether A Law Is Civil Or Criminal Under The Double Jeopardy And *Ex Post Facto* Clauses

The double jeopardy and *ex post facto* clauses apply exclusively to criminal proceedings and punishments. The clauses do not apply to civil proceedings and remedies. *Hendricks*, 521 U.S. at 369.[8] The question of "whether a given sanction is civil or criminal is one of statutory construction". *One Lot Emerald Cut Stones And One Ring v. United States*, 409 U.S. 232, 237 (1972). The Court has developed a two-part test to determine whether a particular proceeding or sanction is civil or criminal. This test has been used to determine the "civil versus criminal" inquiry for both the double jeopardy and *ex post facto* clauses. *Hendricks*, 521 U.S. at 361.

Under the test, the Court asks "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other". *Hudson*, 522 U.S. at 99 (internal punctuation omitted). If the Legislature has adopted the "civil" label, the Court inquires "further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty". *Id.* (citations omitted) (internal punctuation omitted). In applying this test, the Court has held that the seven factors listed in *Kennedy v. Mendoza-*

[8] Justices Scalia and Thomas, however, have concluded that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment". *Hudson*, 522 U.S. at 106 (Scalia, J., concurring).

*Martinez*, 372 U.S. at 168-69, provide useful guideposts.[9] *Hudson*, 522 U.S. at 99. The Court has made it clear that these "factors must be considered *in relation to the statute on its face* and only the *clearest proof will suffice* to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". *Id.* at 100 (emphasis added) (citations omitted) (internal punctuation omitted).[10] The Ninth Circuit, by adopting Young's "as applied" analysis, has deviated from this well-established precedent.

**2. Washington's Statute, On Its Face, Is A Civil Law**

It is not disputed that the Washington Statute, on its face, establishes a proceeding that is civil in purpose and effect. The Washington Supreme Court initially reached this conclusion in *In re Young*, 122 Wash. 2d 1, 857 P.2d, 989 (1993). Applying the two-part test, the Washington court concluded "that the sexually violent predator Statute is civil, not criminal, in nature. The language and history of the Statute so indicate, as do its purposes and effect." *Id.* at 23. As a general matter this Court has given considerable weight to the findings of lower state courts regarding the intent or purpose underlying a state's official actions. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995).

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[9] The seven *Kennedy v. Mendoza-Martinez* factors are "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned". *Hudson*, 522 U.S. at 493 (internal quotation marks omitted).

[10] Historically, in considering evidence of the "clearest proof", this Court has confined its inquiry to matters relating to the intent of the Legislature at the time of the law's enactment. *See, e.g., Cummings v. Missouri*, 4 Wall. 277, 320 (1866); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952); *Flemming v. Nestor*, 363 U.S. 603, 616-20 (1960).



More significantly, this Court upheld the Kansas sexually violent predator law under the two-part test, concluding that "the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive". *Hendricks*, 521 U.S. at 369. The Kansas Act upheld in *Hendricks* was modeled after Washington's Statute, and the laws are nearly identical in all relevant respects.

In this case, even the Ninth Circuit has recognized that Washington's Statute is civil on its face and thus comports with double jeopardy and *ex post facto* protections. *Young v. Weston*, 192 F.3d at 874 ("*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses"). Young has not sought review of the Ninth Circuit's judgment on this point.

Thus, as in *Hendricks*, Washington's Sexually Violent Predators Statute does not violate the double jeopardy and *ex post facto* clauses because the Statute "does not establish criminal proceedings and . . . involuntary confinement pursuant to the Act is not punitive". *Hendricks*, 521 U.S. at 369.

**B. *Hudson* Limits The Test Of Whether A Statute Is Civil Versus Criminal To The Face Of The Statute**

This Court has long held that the purpose and effect test for determining whether a law is civil or criminal "must be considered in relation to the statute on its face". *Kennedy v. Mendoza-Martinez*, 372 U.S. at 169. Applying this principle should have resolved this case because the Ninth Circuit agrees that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a. The Ninth Circuit seeks to avoid *Hendricks* by adopting an "as applied" test to determine whether a proceeding is civil or criminal for the purposes of the double

jeopardy and *ex post facto* clauses.[11] In *Hudson v. United States*, 522 U.S. 93 (1997), this Court rejected the "as applied" test in the context of the double jeopardy clause. *Hudson* held that the purpose and effect test "must be considered in relation to the statute on its face". *Hudson*, 522 U.S. at 100.

The Ninth Circuit's opinion effectively resurrects the "as applied" approach of *United States v. Halper*, 490 U.S. 435 (1989), disavowed in *Hudson*.[12] Departing from the longstanding principle that the civil or criminal character of a statute must be determined in relation to the statute on its face, *Halper* concluded that a violation of double jeopardy "can be identified only by assessing the character of the actual sanctions imposed on the individual". *Halper*, 490 U.S. at 447.

In *Hudson*, the Court rejected the "as applied" standard and "disavow[ed] the method of analysis used" in *Halper*. *Hudson*, 522 U.S. at 96. In doing so, the Court sought to resolve "the wide variety of novel double jeopardy claims spawned in the wake of *Halper*". *Id.* at 98. According to the *Hudson* Court, *Halper* "deviated from [the Court's] traditional double jeopardy doctrine . . . [by] asses[ing] the character of the actual sanction imposed, rather than, as *Kennedy* demanded, evaluating the statute on its face to determine

[11] The Ninth Circuit's decision fundamentally distorts the nature of an "as applied" challenge, permitting such a challenge to be brought when the bases for it are in direct conflict with the terms of the statute at issue. Washington's Statute unequivocally gives committed persons "the right to adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a. In essence, Young contends that the SCC is not providing to him the very treatment that the Statute requires – i.e., that the SCC is not applying the Statute.

[12] However, unlike the case in *Halper*, where the challenged sanction was authorized by the act, the conduct complained of by Young is not even within the ambit of conduct authorized by the Statute. Indeed, it is directly contrary to its requirements. To treat such allegations as an "as applied" challenge is to ignore that the gravamen of Young's complaint is the conduct of state administrative officials, having no basis in the Statute that he purports to challenge "as applied".



whether it provided . . . a criminal sanction". *Id.* at 101 (citations omitted) (internal punctuation omitted). *Halper's* approach had proved "ill-considered" and "unworkable". *Id.* at 93. *Hudson* reaffirmed that the factors listed in *Kennedy v. Mendoza-Martinez* "provide useful guideposts" in determining the purpose and effect of a law. *Id.* at 99. The Court emphasized that "these factors must be considered in relation to the statute on its face". *Id.* at 100.

Although *Hudson* involved the double jeopardy clause, its reasoning is equally applicable to the *ex post facto* clause. In *Hendricks*, and a number of cases, the Court applied the same analysis to determine whether a law is civil or criminal in nature. *E.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960) (*ex post facto* clause); *United States v. Ward*, 448 U.S. 242 (1980) (Fifth Amendment). There is no reason to suppose a different civil versus criminal analysis should apply between the double jeopardy and *ex post facto* clauses.

### C. There Is No Basis For Distinguishing This Case From *Hudson*

*Hudson* disavowed *Halper* and explicitly held that the civil versus criminal inquiry must be applied to the statute on its face. Logically, this conclusion also applies to the *ex post facto* clause. The Ninth Circuit ignores *Hudson*, except for a brief footnote which purports to distinguish this case because "*Hudson* involved monetary penalties and occupational disbarment [and] this case involves confinement". *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n.4. This is a distinction without a difference.

Nothing in *Hudson* suggests that the requirement to consider the statue on its face is limited to monetary penalties and occupational disbarment, and does not apply to confinement. In fact, the Ninth Circuit's claim that confinement requires a different civil versus criminal analysis is contrary to *Hudson's* holding that one of the *Kennedy v. Mendoza-Martinez* factors should not be elevated above all others. One of the *Kennedy v. Mendoza-Martinez* factors

recited in *Hudson* is "whether the sanction involves an affirmative disability or restraint". *Hudson*, 522 U.S. at 99. Nevertheless, under the Ninth Circuit's holding, if such a restraint – confinement – is involved, a statute must be analyzed "as applied" instead of on its face.

*Hudson* disavowed the same kind of analysis. According to *Hudson*, the *Halper* Court erred by "elevat[ing] a single *Kennedy* factor . . . to dispositive status. But . . . no one factor should be considered controlling as they may often point in differing directions." *Hudson*, 522 U.S. at 101 (internal punctuation omitted). The Ninth Circuit's approach shares *Halper's* flaws, because it requires an entirely different double jeopardy analysis of the purpose and effect of a statute if confinement is involved.

The Ninth Circuit also did not explain why it would matter, under the Constitution, whether the law involved confinement or a monetary fine. Under *Hudson*, the exclusive focus of the civil versus criminal analysis is the action of the legislative branch. An improper criminal intent can be derived from the language of the statute or it can arise from the "purpose and effect" of the statute – the natural and necessary possibilities that flow from the Legislature's chosen statutory scheme. When the necessary result of the statute is punitive, there is a violation of the double jeopardy and *ex post facto* clauses. It does not matter whether the law involves a fine or confinement. The Constitution forbids either possibility. The Ninth Circuit's view that double jeopardy and *ex post facto* protections vary depending on the type of sanction is a drastic departure from the prophylactic nature of the double jeopardy and *ex post facto* prohibitions.

The Ninth Circuit also failed to explain why *Hudson* would not apply to a statute involving confinement. It simply asserted that, in "cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement". *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n.4. The Ninth



Circuit cited three case, without explanation, to support this assertion. These decisions do not support the Ninth Circuit's position.

The Ninth Circuit cites first to *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n4. *Hendricks* fails to support the Ninth Circuit's assertion. *Hendricks*' conclusion that the Kansas Act was civil for purposes of the double jeopardy and *ex post facto* clauses was based on the face of the law. Hendricks argued that the Kansas Act was punitive because it did not offer legitimate treatment. *Hendricks*, 521 U.S. at 365. Although the Court discussed the availability of treatment, it based its ruling on the language of the Act. According to the Court:

> "*Indeed, critical language in the Act itself* demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, *has an obligation to provide treatment to individuals like Hendricks. . . . Other of the Act's sections echo this obligation to provide treatment* for committed persons. . . . Thus, as in *Allen* [*v. Illinois*], the State has a statutory obligation to provide care and treatment for persons adjudged sexually dangerous designed to effect recovery . . . and we may therefore conclude that the State has . . . provided for the treatment of those it commits." *Hendricks*, 521 U.S. at 367 (emphasis added) (last ellipses in original) (internal punctuation omitted).

In summarizing its double jeopardy and *ex post facto* civil versus criminal analysis, the Court listed the factors that resulted in its decision, all of which are based on the statute on its face.

> "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and

> afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent." *Hendricks*, 521 U.S. at 368-69.

Similarly, the dissent in *Hendricks*, while making reference to the conditions of Hendricks' confinement, based its ultimate conclusion on factors inherent on the face of the law. Concluding that the Kansas Act violated the *ex post facto* clause, Justice Breyer cited four factors suggestive of the Act's punitive intent. "First, the [Kansas] State Supreme Court . . . has held that treatment is not a significant objective of *the Act*." *Hendricks*, 521 U.S. at 383 (emphasis added). "Second, the *Kansas statute* insofar as it applies to previously convicted offenders, such as Hendricks, commits, confines, and treats those offenders after they have served virtually their entire criminal sentence." *Id.* at 385 (emphasis added). "Third, *the statute*, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of using less restrictive alternatives[.]" *Id.* at 387 (emphasis added). "Fourth, *the laws of other States* confirm, through comparison, that Kansas' 'civil commitment' objectives do not require the *statutory features* that indicate a punitive purpose." *Id.* at 388 (emphasis added).

Nor does *Allen v. Illinois*, 478 U.S. 364 (1986), support the Ninth Circuit's assertion. *Allen* concerned an Illinois law authorizing the civil commitment of sexually dangerous persons. The question before the Court was whether, for Fifth Amendment purposes, Illinois' statute was civil or criminal. As in *Hendricks*, the *Allen* Court focused on the statutory language rather than the actual daily conditions of confinement experienced by Allen. Although noting that it "might well be a



different case" if petitioners had shown conditions of confinement essentially identical to that of felons, the Court did not remand for additional evidence on the statute "as applied". *Allen*, 478 U.S. at 373. Instead, the Court looked again to the language of the statute, noting that "counsel for the State assures us that, *under Illinois law*, sexually dangerous persons must not be treated like ordinary prisoners". *Id.* at 374 (emphasis added).

*Bell v. Wolfish*, 441 U.S. 520 (1979), also does not support the distinction between confinement and other sanctions. In *Bell*, pretrial detainees brought a class action suit alleging that deficient conditions of confinement violated their rights to due process. The suit did not raise double jeopardy or *ex post facto* claims. While the Court focused on conditions of confinement, it did so in order to determine whether an injunction should issue to improve those conditions, not to determine whether the underlying law authorizing pretrial detention was civil or criminal. *Bell*, 441 U.S. at 523-30.

In summary, none of the cases cited by the Ninth Circuit support its assertion that cases involving confinement are an exception to *Hudson's* rule that a statute's civil or criminal character must be determined with reference to the statute on its face.

### D. The Purposes Of The Double Jeopardy And *Ex Post Facto* Clauses Require Limiting Civil Versus Criminal Review To The Face Of The Statute

#### 1. Civil Versus Criminal Review Is A Limitation On Legislative Power

This Court's civil versus criminal jurisprudence was developed as a limit on legislative power. Congress has broad power to adopt civil laws. Congress has less leeway to adopt criminal laws or laws imposing criminal punishment because such laws are subject to constitutional protections, such as those found in the double jeopardy and *ex post facto* clauses. The civil versus criminal test was developed to determine

whether a law is subject to these constitutional protections. *See generally United States v. Ward*, 448 U.S. at 248.

The civil versus criminal jurisprudence sets out a two part test – both parts of which are directed at the actions of the legislative branch. The first part of the test asks whether "Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other". *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (quoting *United States v. Ward*, 448 U.S. at 248). If Congress intends a "civil" label, the second part of the test inquires "whether the *statutory scheme* was so punitive either in purpose or effect as to negate that intention". *Id.* at 362-63 (emphasis added). In other words, even if Congress uses a "civil" label, the court will look at the "purpose or effect" of the "statutory scheme" to determine if it "is so unreasonable or excessive that it transform[s] what was clearly intended as a civil remedy into a criminal penalty". *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956). If the Court finds the purpose or effect of the law imposes a criminal penalty, the Court will apply double jeopardy and *ex post facto* protections despite the civil label.

Thus, the purpose of this Court's civil versus criminal test is to prevent the Legislature from putting a "civil" label on a criminal law to avoid the criminal protections in the Constitution. Since the purpose of the test is to limit legislative abuse of power, the focus of the test should be on the legislative branch and the law in question – on its face. Indeed, this Court has repeatedly held that "the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction". *United States v. Ward*, 448 U.S. at 248; *One Lot Emerald Cut Stones*, 409 U.S. at 237; *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *Allen*, 478 U.S. at 368; *Hendricks*, 521 U.S. at 361; *Hudson*, 522 U.S. at 99.



**2. Double Jeopardy Is Historically A Pre-Trial Plea**

The Ninth Circuit's "as applied" test is inconsistent with the historic purpose of double jeopardy as a pre-trial plea. As its history indicates, double jeopardy is a "paradigmatically pretrial plea". Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1817 (1997). "The common law not only prohibited a second punishment for the same offence, but it went further and [forbade] a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 18 Wall. 163, 169 (1873): "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction." *Abney v. United States*, 431 U.S. 651, 661 (1977).

Under the Ninth Circuit's "as applied" test, however, the court must look at the actual conditions under which a respondent is confined following commitment as a sexually violent predator to determine whether the double jeopardy clause is implicated. Thus, the double jeopardy determination is made only after the respondent has been subjected to the very harm from which the double jeopardy clause provides protection. But as this Court pointed out in *Hudson*, this approach "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even 'attempting a second time to punish criminally'". *Hudson*, 522 U.S. at 102 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

### 3. The *Ex Post Facto* Clause Requires A Focus On Law, Not Activity

The *ex post facto* clause provides that "[n]o State shall . . . pass any . . . ex post facto Law". U.S. Const. art. I, § 10. The purpose of the *ex post facto* clause is to "restrict[] government[al] power by restraining arbitrary and potentially vindictive legislation". *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Like the double jeopardy clause, the *ex post facto* clause applies "only to certain types of criminal laws". *Carmell v. Texas*, 120 S. Ct. 1620, 1627 (2000). The focus of the *ex post facto* clause is on enactment of laws by the state or federal government.

In *Carmell*, this Court adhered to its view that the *ex post facto* clause applies to four categories of laws. *Carmell*, 120 S. Ct. at 1627. (e.g., "1st. *Every law* that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."). Each of the four categories, like the *ex post facto* clause itself, speaks in terms of a law. Thus, the focus of the *ex post facto* clause is the action of the legislative branch.

The Ninth Circuit's "as applied" test departs from this focus on the passage of law and asks this Court to examine the actual day-to-day implementation of the Statute by an administrative agency. Moreover, the day-to-day implementation that forms the basis of Young's complaint is contrary to the requirements of the Statute. Young claims he is not receiving proper care and treatment. Yet the Statute explicitly requires "adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a. Thus, the Ninth Circuit's "as applied" analysis does not turn on retroactive application of the Statute, but on alleged administrative actions which, if true, violate the Statute.



## E. The "As Applied" Test Is Inconsistent With The Constitutional Power Of The Executive Branch

Since the seminal case of *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), it has been incumbent on the executive branch and its agencies to faithfully execute all laws. The *Kendall* Court rejected the notion that the authority to faithfully execute the law includes the power to suspend execution of certain laws:

> "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613.

In fact, the framers of the Constitution clearly intended to deny the President a "suspending" or "dispensing" power beyond the qualified veto procedure specifically described in Article I, Section 7, Clause 2 and subject to an override by Congress. *See generally* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873-96 (1994). By the time of our Constitution, even English kings no longer enjoyed this broad prerogative to avoid execution of laws. *Id.* at 869-72. Thus, it is clear that the executive and agencies of the executive have a duty to execute all laws.

The Ninth Circuit's "as applied" test is inconsistent with the executive's duty to faithfully execute the law and with the legislature's power to make the law.[13] In this case, the

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[13] As with the President, the Washington Constitution requires the Governor to "see that all laws are faithfully executed". Wash. Const. art. III, § 5. And, as with Congress, the Washington Constitution vests the legislative power of the state in the Legislature. Wash. Const. art. I, § 1.

Washington Legislature enacted a commitment statute that, on its face, is civil in purpose and effect. The Statute specifically requires adequate care and individualized treatment, and protects the civil rights of persons committed under its terms. The gravamen of Young's complaint in this case is that the executive branch is failing to comply with these requirements of the Statute.

The Ninth Circuit's "as applied" test assumes that, by failing to comply with statutory requirements, the executive effectively may suspend the law because, according to the Court of Appeals, "[a]ctual conditions of confinement may divest a facially valid statute of its 'civil' label[.]" *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a-8a. If the Ninth Circuit is correct that an executive agency's alleged failure to comply with a statute may vitiate the legislature's adoption of a civil law and thus, render the law invalid, then the executive effectively is empowered to suspend a legislative enactment.

The drastic and untoward effect that the Ninth Circuit's approach would have on the balance of power between the legislative and executive branches of government is reason enough to demonstrate its error and to reject it. In addition, *Kendall* demonstrates its error. *Kendall* stands for the proposition that such a result is not countenanced in the law and that an executive can be compelled in mandamus to comply with the terms of a statute. *Kendall*, 37 U.S. at 624-25. This also is true in Washington. Under Washington law, Wash. Rev. Code § 71.09.080(2), the alleged failure of the SCC to provide adequate care and treatment would be subject to issuance of a writ of mandamus. Wash. Rev. Code § 7.16.160. Although the method for providing adequate care and treatment is discretionary, the decision whether to comply with this provision is not. In addition, the treatment requirement may be enforced in an action under 42 U.S.C. § 1983. *See infra* pp. 31-32.



There is no merit to the Ninth Circuit's approach. Duly enacted statutes must be reviewed for compliance with constitutional requirements as enacted, not on the basis of alleged administrative actions of an executive agency that are contrary to the law. By limiting civil versus criminal analysis to the face of the Statute, in accord with *Hudson*, the Court avoids the unsound and unwise consequences of the Ninth Circuit's "as applied" approach.

### F. The "As Applied" Test Is Unworkable

The Ninth Circuit essentially retreats to *Halper*. *Hudson* disavowed *Halper's* analysis because it "deviated from our traditional double jeopardy doctrine" and because the "as applied" test "has prove[n] unworkable". *Hudson*, 522 U.S. at 101, 93. Like *Halper*, the Ninth Circuit's test deviates from the Court's traditional approach of determining whether a statute is civil or criminal on the basis of the statute itself. And, like *Halper*, the Ninth Circuit's approach is unworkable, although for different reasons.

In *Halper*, the Court performed an "as applied" analysis with respect to a statutorily prescribed monetary charge. Because the penalty was fixed and was imposed only once, rather than on an ongoing basis, precisely how the monetary charge "applied" to Halper was clear and would remain constant. Neither of these predicates for a *Halper*-type "as applied" analysis exists where, as in this case, the focus of the "as applied" challenge is confinement that extends over time, under conditions that may change. The difficulty this presents for an "as applied" challenge can be demonstrated by two examples. Suppose that conditions of confinement at the SCC presently are adequate but that they were punitive at some point earlier in Young's commitment. Or suppose that the conditions were adequate initially, became punitive for a short period and subsequently, were remedied. To what would a

court direct an "as applied" inquiry – to the previously punitive confinement or to the current permissible confinement? Unlike the case in *Halper*, where the focus of the Court's "as applied" analysis was a statutorily fixed one-time sanction, the answer to this question is far from clear.

Perhaps, more fundamentally, the Ninth Circuit's "as applied" approach is unworkable because it will not finally resolve the question of whether Washington's Statute is civil or criminal and, thus, will not finally determine its validity under the double jeopardy and *ex post facto* clauses. Rather, under the Ninth Circuit's "as applied" approach, the validity of the Statute can vary from day to day, and from one committed individual to another, depending on the nature of the care and treatment that is provided at a particular time or to a particular person. The Court should not retreat to such an unworkable "as applied" test.

**G. The Sexually Violent Predator Statute Also Withstands Challenge Under The Double Jeopardy And *Ex Post Facto* Clauses Because It Does Not Involve The Same Offense Or Operate Retroactively**

In *Hendricks*, the Court rejected the argument that the Kansas Act violates double jeopardy, because it fails the same elements test of *Blockburger v. United States*, 248 U.S. 299 (1932). The Court rejected the argument, because the Kansas Act does not make "the commission of a specified 'offense' the basis for invoking the commitment proceedings". *Hendricks*, 521 U.S. at 370. Rather, the Court concluded that the Act "*uses a prior conviction* (or previously charged conduct) *for evidentiary purposes* to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public". *Id.* (emphasis added).



This conclusion applies equally to Washington's Statute as it is identical to the Kansas Act on this point . The Kansas Act, in *Hendricks*, defined a "sexually violent predator" as "*any person who has been convicted of or charged with a sexually violent offense* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. § 59-29a02(a)." *Hendricks*, 521 U.S. at 352 (emphasis added). Wash. Rev. Code § 71.09.020 (1990) provides that "sexually violent predator" means "*any person who has been convicted of or charged with a crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence". Wash. Rev. Code § 71.09.020(1) (1990), Pet. App. at 104a (emphasis added).

*Hendricks* also concluded that the Kansas Act did not violate the *ex post facto* clause because it "*clearly does not have retroactive effect*". *Hendricks*, 521 U.S. at 371 (emphasis added). The same is true of Washington's Statute. Both laws are based on "a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public". *Id.* (emphasis added). Thus, past behavior is taken into account "*solely for evidentiary purposes*". *Id.* (emphasis added).

For these additional reasons, Washington's Statute does not violate the double jeopardy or *ex post facto* clauses.

**H. The Remedy For Inadequate Treatment And Conditions Is An Action Under 42 U.S.C. § 1983**

*Hendricks* and *Hudson* establish that the court looks at the face of the law in determining whether it is civil or criminal

for purposes of the double jeopardy and *ex post facto* clauses. The actual conditions of confinement or adequacy of treatment are irrelevant to this inquiry. This does not mean that Young is without a remedy to cure inadequate treatment or conditions. It only means that the remedy is not found in the double jeopardy and *ex post facto* clauses. As *Hudson* explained, "some of the ills at which *Halper* was directed are addressed by other constitutional provisions". *Hudson*, 522 U.S. at 102-03.

In this case, Young's remedy is not a release pursuant to a writ of *habeas corpus* under 28 U.S.C. § 2254(1).[14] Instead it is an action under 42 U.S.C. § 1983. Young has a right to adequate treatment and conditions under both the Statute and the due process clause of the Constitution. *See Youngberg v. Romeo*, 457 U.S. 307 (1982).

A § 1983 action is currently pending regarding the adequacy of treatment at the SCC for the benefit of Young and others confined there. *Turay v. Seling*, No. C91-664WD (W.D. Wash.), *see supra* pp. 8-9. This is the proper way to address treatment and confinement issues.

[14] Even if the Court were to return to the "as applied" test of *Halper* when confinement is at issue, Young would not be entitled to release under a writ of habeas corpus. In *Halper*, the Court did not void the underlying civil liability. Instead, the Court remanded the case so the government could establish the appropriate non-punitive level of the fine. *Halper*, 490 U.S. at 452. The teaching of *Halper* is that the remedy under an "as applied" test is to eliminate the punitive part of the sanction while permitting the civil part of the sanction to be imposed. In this case, that would mean correcting conditions that render the "as applied" Statute punitive. There is no reason that the result should be any different under an *ex post facto* analysis, where the goal of preventing the retroactive application of punishment can be achieved by improving conditions to eliminate the imposition of "punishment". And this result is effected through a § 1983 action.



## CONCLUSION

The Ninth Circuit reversed the decision of the district court in part and remanded for an evidentiary hearing. For the reasons stated herein, this portion of the Court of Appeals decision should be reversed and the respondent's Petition For Writ Of Habeas Corpus should be dismissed.

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